

Volume 22

Pages 4239 - 4281

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jeffrey S. White, Judge

UNITED STATES OF AMERICA,

Plaintiff,

VS.

NO. CR 11-00573 JSW

WALTER LIEW; ROBERT MAEGERLE;

and USA PERFORMANCE TECHNOLOGY,

INC.,

Defendants.

San Francisco, California

Friday, February 14, 2014

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

For Plaintiff:

MELINDA HAAG

United States Attorney

450 Golden Gate Avenue

San Francisco, California 94102

**BY: PETE AXELROD**

**JOHN H. HEMANN**

**ASSISTANT UNITED STATES ATTORNEYS**

U.S. DEPARTMENT OF JUSTICE

600 E Street NW

Washington, D.C. 20044

**BY: RICHARD S. SCOTT**

**ASSISTANT U.S. ATTORNEY**

**(APPEARANCES CONTINUED ON FOLLOWING PAGE)**

Reported by: Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR  
Official Reporter

**APPEARANCES:**    (CONTINUED)

For Defendant Walter Liew and USA Performance Technology, Inc.:  
KEKER & VAN NEST LLP  
633 Battery Street  
San Francisco, California 94111

BY: **STUART L. GASNER**  
**SIMONA A. AGNOLUCCI**  
**KATHERINE M. LOVETT**  
**CHRISTINA BLAIS**  
**ATTORNEYS AT LAW**

For Defendant Robert J. Maegerle:  
MCKENNEY & FROELICH  
1349 West Peachtree Street  
Two Midtown Plaza - Suite 1250  
Atlanta, Georgia 30309

BY: **JEROME J. FROELICH, JR.**  
**ATTORNEY AT LAW**

Friday - February 14, 2014

8:05 a.m.

P R O C E E D I N G S

---000---

(Proceedings were heard out of the presence of the jury:)

**THE COURT:** Good morning, everybody. Please be seated.

**THE CLERK:** Calling Case Number CR-11-573, United States versus Walter Liew, United States versus Robert Maegerle, and United States versus USAPTI.

Counsel, please state your appearances.

**MR. HEMANN:** Good morning, Your Honor. John Hemann, Pete Axelrod, and Richard Scott for the United States.

**MR. AXELROD:** Good morning, Your Honor.

**THE COURT:** Good morning, everybody.

**MS. LOVETT:** Good morning, Your Honor. Katie Lovett, Stuart Gasner, and a slightly delayed Simona Agnolucci for Walter Liew and USAPTI; and Mr. Liew is present.

**THE COURT:** Good morning, everybody.

**MR. FROELICH:** Good morning, Your Honor. Jerry Froelich for Mr. Maegerle. Mr. Maegerle is present.

**THE COURT:** Good morning. I'm sure you're happy you're out here for not necessarily being in trial, but given what's going on in your home city, Mr. Froelich.

So what I'd like to do is, we made available to you the latest draft of the instructions; and before we get into, you

1 know, the later issue of the theory of defense, I wanted to ask  
2 if anybody had any comments, additional objections, or  
3 discovered typos, or any aspect of this draft that they think  
4 ought to be changed. I'll start with the Government.

5 **MR. AXELROD:** Thank you, Your Honor.

6 Just a few things, and I think perhaps the best place to  
7 start is with the bankruptcy instructions, which are Counts 20  
8 through 22.

9 **THE COURT:** Yeah. By the way, I just want to say, I  
10 guess it's just fatigue, but I erred in responding to  
11 Mr. Hemann's question about which counts the change applied to.  
12 And he asked me -- I forgot what counts you had, but they  
13 actually were exactly the way it was, and I think the draft  
14 reflects what I intended.

15 **MR. HEMANN:** Okay.

16 **THE COURT:** So hopefully that was clear.

17 **MR. HEMANN:** Thank you, Your Honor. I think we  
18 understood where the Court was coming from, yes.

19 **THE COURT:** Okay. Go ahead.

20 **MR. AXELROD:** So in looking at the bankruptcy fraud  
21 instructions, Your Honor, it occurred to us that they should  
22 probably track the actual language in the Indictment. They'd  
23 gotten, I think, in response to a Defense suggestion, cut down  
24 to a narrower description; but it left out, actually, some of  
25 the statements that Mr. Liew made. So what I would suggest,

1 and I'm happy to hand up to the Court, is just tracking the  
2 language of the Indictment.

3 **THE COURT:** All right. Have you given a copy of that  
4 to Ms. Lovett?

5 **MR. AXELROD:** Yes.

6 **MS. LOVETT:** Yes, Your Honor.

7 **MR. AXELROD:** I've given a copy to the Defense.

8 **THE COURT:** Thank you.

9 **MR. AXELROD:** I have another copy if the Court would  
10 like as well.

11 **THE LAW CLERK:** What would be lovely is an email copy.

12 **MR. AXELROD:** Yes. And I figured if this was  
13 something the Court wanted, we would email it to the Court.

14 **THE COURT:** Okay.

15 (Pause in proceedings.)

16 **MS. LOVETT:** Your Honor, if I may briefly respond to  
17 this.

18 **THE COURT:** Go ahead.

19 **MS. LOVETT:** I believe that the Court has made this  
20 instruction more precise than the instruction that was  
21 requested by the defendants, and the defendants are perfectly  
22 fine with the way the instruction is now in the draft final  
23 instructions.

24 We think that the Government's proposed language goes a  
25 little too far in terms of being specific. They've put on

1 evidence of what Mr. Liew said or didn't say; and pointing out  
2 the parts of the bankruptcy petition where -- or statements in  
3 the bankruptcy proceeding is sufficient to direct the jury's  
4 attention to wherever they need to look in their notes or in  
5 their memory, and they don't need to indicate which specific  
6 statements Mr. Liew made.

7           **THE COURT:** Well, I guess the question is really, I  
8 guess, more to the point is: Is there any reason why the Court  
9 shouldn't track the Indictment language unless -- and the  
10 reason not to, for example, is if there were essentially, I  
11 won't use the term "variance," but if the evidence and the  
12 Government's theory, as it was presented at trial, was  
13 different than the Indictment, then it would be appropriate.

14           So, for example, the Court excluded one of the overt acts  
15 because there was no proof of that overt act. So that would be  
16 a reason.

17           So I guess my question to you is, more particularly, why  
18 wouldn't tracking the language of the Indictment be  
19 appropriate; or is the language in the Indictment different  
20 from what the evidence actually showed?

21           **MS. LOVETT:** Your Honor, as you know, I wasn't here  
22 for the bankruptcy testimony, but I have reviewed the  
23 transcripts. I can't say that the evidence differed from the  
24 Indictment.

25           What I can say is that adding this language to Counts 20

1 through 22 would make these counts much more specific than any  
2 other count in the instructions in terms of telling the jury  
3 exactly what Mr. Liew said or didn't say, and it just concerns  
4 me that giving all these details about what Mr. Liew said or  
5 did will cause the jury to put a lot of weight on what is said  
6 in the instructions rather than what they recall the Government  
7 presenting in evidence.

8 Defendants' concern proposing the language we did the  
9 other day was that the instructions weren't specific enough  
10 about what particular kinds of statements the Government had  
11 indicted Mr. Liew for allegedly making.

12 **THE COURT:** All right. Anything further you want to  
13 say on this point?

14 **MR. AXELROD:** No. Just that we should either have a  
15 general instruction or a specific instruction, not one that's  
16 in the middle.

17 **THE COURT:** Well, I'll take this one under advisement.  
18 I understand your arguments.

19 All right. Any others?

20 **MR. AXELROD:** No, not -- I mean, other than the  
21 Defense -- the Defense theory instruction.

22 I would note, Your Honor, in Count 1 on page 23, in the  
23 description of the foreign instrumentalities, it goes through  
24 the specific Pangang Group entities; and then at the end  
25 there's a phrase "collectively Pangang Group companies" in

1 brackets, which is -- that's sort of the only place it's  
2 mentioned. It may be appropriate to just strike that off so  
3 there's no confusion about the specific entities.

4 **THE COURT:** That sounds -- it is confusing. Do you  
5 have any problem with that?

6 **MS. LOVETT:** We'd be perfectly fine with that, Your  
7 Honor.

8 **THE COURT:** Okay. So we'll strike the words parens,  
9 on line 25 on page 23, the words, quote, "collectively Pangang  
10 Group companies," unquote, closed paren, will be stricken.

11 **MR. AXELROD:** Very well.

12 **THE COURT:** Ms. Lovett, we'll discuss the  
13 theory-of-defense issue after we get to anything else; sort of  
14 low-hanging fruit, if you will.

15 **MS. LOVETT:** Your Honor, we didn't notice anything  
16 along those lines. I just want to note for the record, and the  
17 Court noted it yesterday, we reserve all of our prior  
18 objections.

19 **THE COURT:** Of course. And they are reserved, and  
20 that's by order of the Court.

21 Okay. That's fine.

22 So let's move on to the bigger issue, the issue of theory  
23 of defense.

24 I've read both sides' proposals and reviewed authorities  
25 cited by the parties and others, and I just want to give my



1 own -- not my own -- my own sort of take on what the  
2 Ninth Circuit teaches in this area.

3 A couple of cases are really instrumental -- not  
4 instrumental, but illustrative and helpful to the Court that I  
5 wanted to focus on. One is *U.S. versus Lopez-Alvarez*,  
6 970 Fed. 2d 583. And that was a case involving the issue of  
7 whether the defendant was actually present -- this involved the  
8 murder of Agent Camarena, kidnapping and murder of Camarena.  
9 And the theory of the defense was that the defendant wasn't at  
10 the scene of the kidnapping, and any information he gave the  
11 agents about his involvement was by hearsay and not by virtue  
12 of him being present at the interrogation and kidnapping of the  
13 agent.

14 And they wanted -- the defendant asked for an instruction  
15 that, basically, if you find that the defendant was not present  
16 at the crime while the crime was being committed, because it  
17 was a felony murder charge as well, then you must acquit the  
18 defendant.

19 The District Court rejected the proposed instructions of  
20 actually it was both defendants. And the Ninth Circuit said  
21 the following on page 597, it's a quote, and I'll go slowly for  
22 the court reporter: (reading)

23 "We believe that the District Court did not commit  
24 reversible error in rejecting the proposed instructions.

25 The jury was properly instructed in the elements of each

1 offense and the Prosecution's burden of proof. These  
2 instructions made it obvious to the jury that if it found  
3 that Lopez-Alvarez' admissions did not come from personal  
4 knowledge of the Camarena affair but were fabricated on  
5 the basis of information received from other sources, it  
6 should find him innocent. In addition, under the facts of  
7 the case, it should have been clear to the jury, even  
8 without the instruction, that Lopez-Alvarez should be  
9 acquitted if it found that he was not present during any  
10 of the criminal occurrences. Thus, the defendant's  
11 proposed instructions were not necessary to explain to the  
12 jury the legal effect of the theory of the defense. A  
13 defendant is not entitled to any particular form of  
14 instruction, nor is he entitled to an instruction that  
15 merely duplicates what the jury has already been told.  
16 Accordingly, the District Court did not err in refusing  
17 the proposed instructions."

18 The other case that I wanted to talk about was,  
19 interestingly enough, another case involving a defendant named  
20 Lopez, the *United States versus Lopez*, 885 Fed. 2d 1428. And  
21 in that case, that was a case involving a helicopter escape  
22 from a federal prison. It sounded like a movie, but it was a  
23 pretty serious case. And the defense was necessity. The  
24 defendant who -- the rescuer if you will, said he was trying to  
25 rescue his girlfriend because he felt that the guards were

1 going to kill her, so it was a necessity defense.

2 The Court gave, at the defendant's request, an instruction  
3 on necessity; but, unfortunately for the Government, it was an  
4 erroneous substantive instruction, and the question was then:  
5 Should the Court, the Ninth Circuit, reverse?

6 And the Ninth Circuit there said -- first they gave the  
7 standard of review, a District Court failing to instruct on a  
8 defendant's theory of the case; and they say, and I'm quoting  
9 at page -- I don't have the jump cite right now, but it's at  
10 Headnote 5678: (reading)

11 "Moreover, we have deemed such a failure to give,"  
12 theory of defense instruction, "error if the instruction  
13 'is supported by law and has some foundation in the  
14 evidence.'"

15 And I'm excluding the internal citations: (reading)

16 "It is not error, however, to reject a  
17 theory-of-the-case instruction if other instructions in  
18 their entirety cover the defense theory. Indeed, so long  
19 as the instructions fairly and adequately cover the issues  
20 presented, the judge's formulation of those instructions  
21 or choice of language is a matter of discretion."

22 And the Court goes on to say: (reading)

23 "In the instant case, it is clear that Lopez' defense  
24 theory necessity was adequately presented to the jury  
25 through the instructions actually given by the trial

1 court."

2 And, finally, the last case that I wanted to discuss or  
3 bring up is the *Mason* case that was cited by the defendant, and  
4 this is a case where -- this is at 902 Fed. 2d 1434 decided in  
5 1990 by the Ninth Circuit. That was a case where the defendant  
6 claimed that -- it involved an escort service, and the  
7 defendant claimed that the activities of the defendant were  
8 authorized by the Government.

9 And the Court, in response to a request for a  
10 legal-defense-theory instruction, gave an instruction on  
11 entrapment; and then the Court goes on to talk about what that  
12 instruction said.

13 And, so, what the Court said, it said that: (reading)

14 "It is apparent that this entrapment instruction does  
15 not adequately express the defendants' theory of the case  
16 as the district court initially recognized. This is not  
17 an entrapment situation in which a covert government agent  
18 engages in a criminal transaction with a defendant."

19 And then they talk about why the issue is different. And  
20 then the Court goes on to say: (reading)

21 "The evidence produced at trial was sufficient for a  
22 jury reasonably to find that the government authorization  
23 continued through the times of the misconduct alleged in  
24 the indictment."

25 And the defendants properly objected to the instruction.

1       So it says, the Court went on to say that -- it cites --  
2       traces the cases involving defense-theory instructions, and  
3       said that in this case such an instruction was appropriate:  
4       (reading)

5               "The Government argues that the instructions defining  
6       'unlawfully' and 'willfully,'" which the Court did give in  
7       its general instructions, this is what the Government  
8       contended on appeal, "appropriately instructed the jury on  
9       the theory of the defense. The difficulty with these  
10      instructions is the defendants acknowledge that, in  
11      running the prostitution business" --

12      I guess it wasn't an escort service after all. When I  
13      first read this, I said, "That's not a crime," but I'm pretty  
14      naive. (reading)

15              "The difficulty with these instructions is the  
16      defendants acknowledge that, in running the prostitution  
17      business, they were knowingly doing something contrary to  
18      law and intentionally doing something the law forbids; but  
19      they contend this was authorized by the law enforcement  
20      agents of the federal government in order to use them as  
21      informants."

22      And the Ninth Circuit goes on and says: (reading)

23              "In fairness, these instructions on general intent do  
24      not meaningfully express to the jury the theory of the  
25      defense, particularly when considered with a misleading

1        entrapment instruction that immediately followed the  
2        general instructions."

3        So the Court, basically, said, in that case they  
4        criticized the District Court for not giving the instruction.  
5        And in that case they found that in this case: (reading)

6                "... the instructions as a whole in the context of  
7        this trial did not fairly convey to the jury the law on  
8        the theory of the defense, particularly in light of the  
9        misleading entrapment instruction."

10        So that brings me kind of full circle and to ask Defense  
11        counsel this: Tell me -- and I actually looked at all of your  
12        requests for theory-of-defense instructions and tried to craft  
13        one that would accurately capture the defense theory of the  
14        case. And in so doing, I kept running up against other  
15        instructions -- for example, definition of trade secrets,  
16        reasonable belief that it's a trade secret, intent,  
17        willfulness, et cetera -- and came to the sort of tentative  
18        view that all of the aspects of the defenses that are asserted  
19        and in the instructions are captured by the overall  
20        instructions.

21        The other thing that strikes me, this whole area of theory  
22        of defense is not new and typically involves issues, like in  
23        the *Lopez* case, where you have a defense that is outside of the  
24        Government's affirmative case; such as, potentially duress,  
25        necessity, or insanity, or something that's a stand-alone

1 affirmative defense.

2 And I have a feeling that the defendants here are  
3 conflating what is a defense and what is their theory of the  
4 case or their legal theory as distinguished from their theme or  
5 their narrative.

6 So I guess I'm asking a very specific question. First of  
7 all, I find that the instructions requested by the defendants  
8 are not appropriate the way they're phrased; but I would like  
9 to know from both Defense counsel what aspects of their defense  
10 are not covered by the instructions that the Court has already  
11 said it was going to give.

12 **MR. GASNER:** May I respond, Your Honor?

13 **THE COURT:** Yes. Yes, please.

14 **MR. GASNER:** First of all, just to respond to the  
15 humorous ring, that I think that the cases that the Court cited  
16 are factually distinguishable in all ways from the current  
17 case.

18 **THE COURT:** Right.

19 **MR. GASNER:** They're involving the murder of Mr. Kiki  
20 Camarena and prostitution rings, and the like. And I say that  
21 simply in a humorous vein.

22 But more seriously and to respond to the Court's question,  
23 the way the trade secret case proceeded and was prosecuted and  
24 cross-examined gave the impression that our defense is that  
25 every single thing that was ever done in the 30K and 100K

1 projects had to be tied to a patent, and that's not our theory.

2 Our theory is that, starting back in 1996 and 1997,  
3 Mr. Liew did a lot of research. We saw the notebooks. There  
4 are -- there's an Exhibit 221 in which there's a letter to  
5 Mr. Maegerle from Mr. Arbogast in which he says that the method  
6 of operation that Mr. Marinak and Mr. Liew, and potentially  
7 Mr. Maegerle, were going to engage in, "as unbelievable as it  
8 sounds, is to gather technical and process information from  
9 available public sources and patent literature and put a  
10 package together."

11 So starting back in 1997, there was a lot of research  
12 done. There were many discussions with the Condux Expert  
13 Service. There were meetings in Delaware with Mr. Marinak and  
14 Mr. Arbogast, Mr. Liew, Mr. Maegerle, all meeting together, at  
15 which this concept was originally presented.

16 They then went forward, and there are other documents and  
17 testimony about that method of operation, in which Mr. Maegerle  
18 would rely upon his knowledge of his days many years prior at  
19 DuPont to go forward; and it's on that basis that the parties  
20 went forward.

21 A huge piece of our defense, as the Court well knows from  
22 Mr. Cooper's testimony and elsewhere, is that there are no  
23 trade secrets as alleged by the Government; that these, based  
24 on his expert opinion and his research, were found by him,  
25 based on his long experience, not to be trade secret.



1           **THE COURT:** Let me interrupt you and apologize for the  
2 interruption. I don't know that you're answering me.

3           As I'm listening to you give, you know, your argument and  
4 each time -- because I did this late last night. I actually  
5 sat there with a checkmark and went through your instructions  
6 and then went through the instructions the Court was going to  
7 give.

8           So you just said, "Well, this is not a trade secret.  
9 That's not a trade secret." Well, the terms "trade secret" are  
10 carefully and, hopefully, correctly defined in this case and  
11 gives you the leeway to argue, based upon the evidence, that  
12 because this material was in the public domain or DuPont didn't  
13 protect it, or whatever your theory is, you haven't told me  
14 what part of the instructions don't capture, as a legal matter,  
15 your defense.

16           And let me go on one thing further, and this is slightly  
17 off topic but I meant to bring it to your attention. When I  
18 asked you to come up with -- when I asked the defendants to  
19 come up with an instruction, and I said I wanted it to be  
20 generic and a real instruction rather than the Court's  
21 imprimatur on a closing argument, what I had in mind, actually,  
22 it was something in this *Mason* case, the prostitution case.

23           Interestingly, the defendants' instruction was that, which  
24 implicitly the Ninth Circuit said in that case was appropriate,  
25 the proposed instruction, which the Court rejected, was as

1 follows -- remember, the issue was that the Government knew  
2 about and authorized this conduct -- quote: (reading)

3 "Where a person carries on," a person, "carries on  
4 criminal conduct at the request or behest or asking of the  
5 government," et cetera, "the law, as a matter of policy,  
6 forbids his or her conviction in such a case. If the  
7 evidence leaves you with a reasonable doubt as to the  
8 defendant's intents and purposes to commit the charges in  
9 this indictment, then it is your duty to find him or her  
10 not guilty. The burden is on the government to prove  
11 beyond a reasonable doubt that the defendants were not  
12 induced by governmental behavior or asked to commit the  
13 charged offense."

14 And, in my view, you haven't given me anything yet, any  
15 part of your argument, that's not covered by the instructions.

16 **MR. GASNER:** There's no doubt, Your Honor, that there  
17 is a very small Venn diagram overlap that would create a  
18 defense theory of the case if the approach is anything that is  
19 covered by some other instruction.

20 So, for example, good faith. Good faith is almost always,  
21 I would think, covered, to some extent, by simply negating the  
22 Government's proof as to elements of the offense.

23 **THE COURT:** Right.

24 **MR. GASNER:** We certainly plan to do that.

25 So the elements that we were trying to capture -- we

1 knocked out good faith in our dialogue with the Government  
2 because they cited *Shipsey*; and we thought, "Okay. There's  
3 another way to express good faith."

4 That led us to the locution that we used in the proposal  
5 that we submitted to the Court simply because the clock ran  
6 out.

7 **THE COURT:** No, I understand.

8 **MR. GASNER:** This is really hard, and I said yesterday  
9 I'm not sure that my defense can be encapsulated in the period  
10 of time in an elevator, so I do think there's some tension  
11 here.

12 **THE COURT:** I hope it was a big building.

13 **MR. GASNER:** Even with a big building, it would take  
14 more time.

15 **THE COURT:** Yes.

16 **MR. GASNER:** So I appreciate the Court's thought  
17 process that you do bump into other areas.

18 There were many times where I thought, "This is too hard.  
19 Why bother?" But --

20 **THE COURT:** That's kind of where I came at 11:00  
21 o'clock last night. I always try to rewrite it, especially in  
22 light -- you know, I actually didn't have this *Mason* case in  
23 mind at the time, I read it this morning; but it struck me, not  
24 that why bother, but it can't be done because to fairly  
25 encapsulate Mr. Liew and USAPTI's defense would take, really,

1 almost writing your closing argument.

2 And, you know, when I teach trial practice, I teach the  
3 trial practices as various elements. One is your theme, which  
4 is the moral imperative; and the Government will have their  
5 theme that, you know, it's a case about whatever. And you'll  
6 say, "No, it's a case about ingenuity being penalized by the  
7 Government," or whatever you want to call it.

8 And then you'll have what I call the narrative, the story,  
9 what happened here.

10 And then you have the legal theory: From the Government's  
11 standpoint, why they are entitled to a verdict of conviction;  
12 and from your perspective, why the Government hasn't proved  
13 that. And your legal theory is, usually in this case, mostly  
14 negating the elements.

15 And, so, you were -- you know, we were all sort of  
16 conflating legal theory and narrative together and asking the  
17 Court to present that for you, and I struggled with how to do  
18 it here. And if it can't be done, then it can't be done.

19 **MR. GASNER:** If I might, Your Honor, I did survey my  
20 law firm and try to get some samples; and one that I got from  
21 Mr. Keker from the *Bruce Karatz* case read as follows:

22 (reading)

23 "The Defense contends that Mr. Karatz acted in good  
24 faith at all times because he never believed that  
25 KB Home's stock option branding practices were illegal or

1       improper. That is demonstrated by the fact that KB Home's  
2       stock options process were known to many individuals  
3       within the Legal, Finance, and Human Resources Department,  
4       none of whom sought to keep the practice secret or thought  
5       it was illegal. In 2006, Mr. Karatz further demonstrated  
6       his good faith by recommending an outside investigation of  
7       KB stock option practices."

8               **THE COURT:** Was that ever blessed by the  
9       Ninth Circuit?

10              **MR. GASNER:** I don't know, and --

11              **THE COURT:** It probably would be because it would be  
12       only the Government who would object, and they wouldn't -- I  
13       don't think they'd necessarily care much about what the  
14       Government had to say about an instruction that was given if  
15       it's not error.

16              **MR. GASNER:** So I apologize. I don't know whether  
17       this was given, but I used it as a bit of a model for trying to  
18       capture, you know, in a short instruction that encapsulates  
19       many aspects.

20              And good faith is an important part of it, and I  
21       struggled, too. And the things that came to my mind, one is  
22       the idea that based on research -- pretty much what I said  
23       before, Your Honor. I won't repeat it.

24              If the Court feels that argument is going to solve this  
25       problem along the lines that the Court indicated, and it seems

1 that's the way the Court is headed, and we're prepared simply  
2 to argue.

3 But for the record, I would simply state that if given a  
4 little bit more time to submit something, we would do so; and  
5 what I would say is that it would include elements of good  
6 faith; of the two lines that weren't objected to in the  
7 Government's opposition, that these were commercial contracts  
8 and in performing these engineering services, USAPTI and  
9 Mr. Liew received designs and information from Mr. Maegerle;  
10 and then some phrasing that would capture the idea that  
11 residual knowledge is a permissible area for consultants to  
12 rely upon in doing their jobs, and that many aspects of what  
13 went forward were usual and ordinary. And they --

14 **THE COURT:** Well, here's my problem with that: In the  
15 instructions that the Court has indicated it would give, there  
16 is an instruction that the Court has now incorporated into the  
17 "trade secret" definition about skill, acquired skill, and all  
18 that. So there's another problem.

19 And at the end of the day, the reality is, as far as, you  
20 know, the clock running out and all that, you know, the Court  
21 gave the parties an opportunity to present an instruction. I  
22 don't think the instruction is proper the way it's phrased. I  
23 think that some aspects of it are not even supported by the  
24 evidence, and it doesn't even fully -- it's misleading because  
25 it doesn't fully capture the fullness of the defense from your

1 own perspective.

2 So, you know, the Court doesn't have to write an  
3 instruction. The Court has to react. And I don't think what  
4 you've proposed is required by the Ninth Circuit; and I think  
5 from my -- as far as Mr. Liew and USAPTI is concerned, I think  
6 the instructions capture your entire theory of the case.

7 So my inclination is, as to your clients, is not to give  
8 it. If you want to try to come back, and it better happen  
9 soon, with something different, you can do it; but you should  
10 be prepared to tell me and annotate it with what aspects of the  
11 instructions -- what aspects of your theory, more importantly,  
12 are not captured by the instructions.

13 And to say, "Well, it's not captured in detail because it  
14 doesn't mention Mr. Maegerle, you know, having a reasonable  
15 belief and Mr. Liew relying on Mr. Maegerle," or whatever, then  
16 you're going to run up against the Ninth Circuit's teachings in  
17 these cases.

18 So if you want to do it, you need to do it, you know,  
19 pretty quickly, like the end of today, because we have a  
20 holiday weekend coming up, and I'm not -- my inclination is not  
21 to give it.

22 And, I think, you know, you're a good lawyer and I think  
23 you are very respectful of the Court's time and your own time.  
24 If you in good faith think there's something that's within  
25 these cases and is not covered by the totality of the

1 instructions and you can convince me of that, then I'll  
2 consider giving it, but I need it by 5:00 o'clock today.

3 **MR. GASNER:** We won't waste the Court's time. I think  
4 the Court's direction is clear, and I don't want to engage in a  
5 futile act to spend a lot of time preparing something it seems  
6 clear that the Court -- I think I understand the Court's legal  
7 view of what the nexus or lack of nexus needs to be between a  
8 theory-of-the-defense instruction and what's elsewhere in the  
9 instructions; and I think the record is clear that that's the  
10 Court's view of the law.

11 I think we've presented what we would propose, and I think  
12 it's likely going to be futile for us to try to package that  
13 against --

14 **THE COURT:** It's not because the Court is not willing  
15 to listen. I think it's futile because I think you're going to  
16 butt up against what I think the Ninth Circuit's teachings are;  
17 and I think -- and whether or not you agree with the  
18 Ninth Circuit's view, it is the Ninth Circuit's view.

19 And unless, the way I look at it, unless there's some sort  
20 of crisp, stand-alone issue -- authorization was one, necessity  
21 was another -- which sort of is not captured -- because it's  
22 almost like, the analogy I would think about is, you know,  
23 there's certain pieces of evidence that are not admissible  
24 because they're excluded by the extrinsic policy; such as,  
25 settlement agreements, recent repairs, subsequent repairs in a



1 civil case, which are stand-alone. Even if you find the person  
2 did what you think they did, you can't consider this evidence.  
3 That's the way I view what the Ninth Circuit is teaching us,  
4 rather than the Court has an obligation to explain, essentially  
5 help the Defense, by giving its own imprimatur on their theory.

6 So that's what you're up against. I will say for the  
7 record that that's my current inclination based upon what's  
8 presented, but if you can give me something by 5:00 o'clock.  
9 You know, my strong inclination is not to do it; but I will  
10 definitely listen to it, apply the Ninth Circuit law, and  
11 determine whether I'm going to reconsider.

12 **MR. GASNER:** Thank you.

13 **THE COURT:** All right. Mr. Froelich?

14 **MR. FROELICH:** Yes, Your Honor. I have a different  
15 view than he does.

16 **THE COURT:** Oh, good.

17 **MR. FROELICH:** I have different views than the Court.

18 **THE COURT:** Okay. Let's hear it.

19 **MR. FROELICH:** Your Honor, first of all, I believe  
20 this is -- I've asked for a good faith instruction, and I  
21 believe that this is separate. It's like entrapment. It is  
22 different. It is a stand-alone defense because this is a case  
23 where it could be a trade secret but it doesn't matter if he  
24 had a good faith.

25 It's just like entrapment: I violated the law, but I was

1 entrapped into violating the law. So it's a consistent and  
2 different defense that I believe a Court -- that a jury must be  
3 instructed on.

4 I cited, in my initial, I cited to the United States  
5 Supreme Court case in *Morrisette versus United States*, 345  
6 [sic] U.S. 246. And at 265, among other places within it, it  
7 says that the law recognizes a good faith defense as the  
8 conversion, theft, things like -- and those type of offenses,  
9 common law offenses.

10 And that's what we have here. We have a theft or a  
11 conversion. And, so, I believe that we're entitled -- and I  
12 changed -- Your Honor, as you saw, I limited my instruction  
13 greatly.

14 One of the cases that the Court -- I mean, excuse me, that  
15 the Government cites is, I think it's -- I don't know how to  
16 pronounce it correctly; I'm terrible with pronunciation, as the  
17 Court knows -- it's Shipley [sic] or what it is, but it's 363  
18 Fed. 3d 962.

19 But one thing I have to say is, you know, a defendant is  
20 entitled to a defense, and the Court is not going to make a  
21 mistake if it gives the defendant's theory. It can make  
22 mistakes by not giving it, and we've been here seven or eight  
23 weeks.

24 But listen to what the instruction was. This is the  
25 instruction that was approved in the Ninth Circuit when it said

1 that: (reading)

2 "In determining whether or not a defendant acted with  
3 the intent to defraud, you may consider whether or not a  
4 defendant acted in good faith belief in the truthfulness  
5 of his...."

6 That's the case that they cite to say you shouldn't get a  
7 good faith instruction. The Court gave a good faith  
8 instruction, and it was approved, and that's the very language.  
9 And I kind of, almost on top of that with my -- with what I  
10 quoted and what I gave the Court.

11 So good faith is a separate defense. It's like an  
12 entrapment. It's like Government -- a Government-blessing  
13 defense. You know, "I was entitled to do this because I was --  
14 I had the authorization by the Federal Government," those type.

15 And without this, the jury doesn't understand about good  
16 faith. It never hears the word "good faith" except from me;  
17 and they say, "Mr. Froelich says it. What does that mean?"

18 **THE COURT:** All right. What's your response first on  
19 the good faith piece?

20 **MR. HEMANN:** First on the good faith, I don't think  
21 that's what *Shipsey* said. I didn't bring the case up with me,  
22 but the holding of *Shipsey* is very clear. The cases upon which  
23 *Shipsey* relies are very clear.

24 I did not understand, candidly, *Shipsey* to have said that  
25 the District Court gave the instruction that Mr. Froelich just

1 read. I could be completely wrong. I have to go down and look  
2 at it again, Your Honor, but I believe that that's the  
3 instruction that the Court rejected.

4 And I think that the premise that good faith is the  
5 negation of the elements that the Court has instructed on is  
6 the law of the Ninth Circuit, and the good faith instruction is  
7 not required.

8 I don't have any qualms about the Court's comments to  
9 Mr. Gasner. I don't need to comment unless the Court has a  
10 question, or waste the Court's time with that.

11 I would only note that we did object to the entire  
12 instruction as written because we think that it highlights a  
13 factual argument that the defendant wants to make and is not a  
14 legal -- it's not a legal instruction.

15 **THE COURT:** All right. Anything else?

16 I'm going to, obviously, think about this, see if anything  
17 further is presented by the defendants in light of my comments.  
18 I'm not requiring them to do so. And they can certainly stand  
19 on what they requested, and then it's in the record; and the  
20 Court will -- I said I will not accept it and I won't give the  
21 instruction. But if another one is given, I'll rule on that,  
22 you know, if I get it by 5:00 o'clock.

23 And then, of course, you'll have, both sides, everybody  
24 will have their objections preserved.

25 Is there anything further that the Government wanted to

1 say on instructions?

2 **MR. HEMANN:** No, Your Honor. I was going to ask the  
3 Court to have a further discussion about the order of  
4 arguments, and then --

5 **THE COURT:** Oh, thank you. Thank you.

6 **MR. HEMANN:** -- and I have a question about something  
7 in particular during closing and how the Court would like to  
8 handle it.

9 **THE COURT:** All right.

10 **MR. HEMANN:** I can take them in either --

11 **THE COURT:** Let's do the timing issue first. So the  
12 ruling of the Court is as follows:

13 I'm going to go with my initial inclination. We're going  
14 to start with the jury instructions, which took, I read it in  
15 bed last night, 52 minutes. And I tried to read it sort of *Cat*  
16 *in the Hat*, you know, like I'm reading to my grandchildren so I  
17 wouldn't kill the court reporter. It took 52 minutes, so I  
18 figure that's going to take 52 minutes and maybe a little -- if  
19 I take a stretch break in the middle, maybe closer to 55  
20 minutes.

21 Then I'm going to allow the Government to do their first  
22 closing. Then I'm going to have Mr. Gasner do his closing.

23 I'm going to tell the jury in the morning that we may --  
24 that we're planning on going over. In order to be fair to  
25 everybody and to them and to do this in a balanced way, we're

1 not going to stick to the normal time.

2 So the jury won't be looking at their watch at 1:30, I'm  
3 going to tell them that 1:30 doesn't apply on Tuesday. So that  
4 will take away some of the pressure.

5 I understand, Mr. Gasner, your point about, you know,  
6 you'll be last and they'll be tired, but this is a pretty  
7 vigorous jury. They seem to write everything down and, you  
8 know, they're on to, you know, every issue and even the coffee  
9 and those kinds of things.

10 So that's what we're -- and then the following day we'll  
11 start with Mr. Froelich's closing; and if there's something you  
12 wanted to pass on, you know, transitionally, Mr. Gasner, I'm  
13 sure Mr. Froelich will be very, you know, effective and  
14 helpful. But I'm not -- I won't tell you how to divide it up.

15 And then we'll have the Government's reply, and I'll --  
16 but there's a piece of the instructions, which -- like, the  
17 last couple, which are really more housekeeping ones, starting  
18 with Duty to Deliberate on page 46, which I give after the  
19 closing arguments. So that will be the last thing, and then  
20 they'll deliberate.

21 And as far as schedule, their own schedule, I told you  
22 about that.

23 Now, has there been any further discussion about the  
24 electronic presentation?

25 **MR. GASNER:** Yeah. Yes, Your Honor. There has been

1 further discussion on our team, and perhaps Ms. Lovett can  
2 address where we are.

3 **MS. LOVETT:** Sure.

4 Your Honor, I emailed the Government about this yesterday,  
5 but I imagine in the mix of everything, they haven't had a  
6 chance to get back to us yet.

7 We propose that we set up a stand-alone computer back in  
8 the jury room, either a desktop or a laptop, and a projector so  
9 that they can all look at things at the same time, and load  
10 .pdfs of all admitted exhibits onto that computer.

11 We haven't heard from the Government yet about whether  
12 they're interested in that.

13 **THE COURT:** You're saying all? All right. That  
14 raises a question of the following: Whether all of the  
15 exhibits are electronically stored, including all those big  
16 diagrams, and things like that.

17 **MS. LOVETT:** We do have .pdf copies of all of the  
18 exhibits. What we're proposing wouldn't include the ability to  
19 look at those autoCAD files in, like, a CAD viewer; but other  
20 than that, all the digital files, I think, we have copies of.

21 **MR. HEMANN:** So, Your Honor, we don't have an  
22 in-principle objection to having that there. I have a -- we  
23 have a practical concern, which is mostly a quality control  
24 concern.

25 There have been a large number of documents that have been

1 either redacted or only admitted in part. I'm extremely  
2 concerned that we will not have time between now and Wednesday  
3 to do an adequate quality control and make sure that only those  
4 portions of the exhibits that have been admitted are on  
5 whatever the final disk or disks that go to the jury are.

6 And I think I would give one example that literally just  
7 came to mind. During either Mr. Lewis or Mr. Cooper's  
8 testimony, and I believe it was Mr. Lewis, there was a --  
9 remember there was the photographs of the Pangang officials  
10 with their titles in Chinese and there was a page?

11 **THE COURT:** Right.

12 **MR. HEMANN:** The page that was displayed by the  
13 Defense, the corresponding page, had actually been redacted at  
14 the bottom, and the paper copy that had gone to the Court had  
15 been redacted but the electronic copy had not been redacted.  
16 And it's not a -- it's not an aspersion at all. It's just a  
17 thing that happens. I'm sure our documents are in the same  
18 shape. And, so, that's my concern.

19 **THE COURT:** But doesn't the same issue come up with  
20 the hard copies? You're still going to have to go through.  
21 There was a couple of documents where, I don't know if -- there  
22 were some documents where I allowed certain pages and not  
23 others to go in.

24 **MR. HEMANN:** We've been very careful with Ms. Ottolini  
25 about that with our paralegals.



**THE COURT:** All right. Well, it's not worth talking about. You know, we'll just -- if both parties are not completely in the game, I would say that in the last -- not the last -- two trials ago, the patent case, there were more exhibits, if you can believe that, and much more complicated exhibits, it was source code in Russian was in evidence, and we did it. And I talked to the jury afterwards about the format of it, and they thought it was great.

So, you know, it's a theory; but if the parties -- if both parties are not absolutely comfortable with it, I don't want to make work for the parties.

And where the downside is, if a party makes a mistake, something improper goes to the jury. The case books are legion with cases where nonadmitted documents or pieces of it went to the jury. I actually once had a case where, when I was a prosecutor, where the case report, the whole case report, which was used for impeachment, went to the jury and had the rap sheet of the defendant; and, of course, that was -- even in the Fourth Circuit it was reversible error.

(Laughter)

**THE COURT:** That's pretty bad in the Fourth Circuit at that time.

So I don't know if you want to say anything about it. I don't know -- I don't want to make work for all of you; and if there's not an agreement on that -- and Mr. Hemann raises an

1 important issue. And it seems like the amount of time it would  
2 take to, you know, be a hundred percent sure is better put in,  
3 you know, working with your respective sides on the closings.

4 And we'll just -- I will know, because Ms. Ottolini is  
5 involved, that nothing will get to the jury that's not admitted  
6 and appropriate for them to see.

7 **MS. LOVETT:** Your Honor, we're fine with that  
8 approach. We're fine with just sending the paper copies back  
9 to the jury.

10 **THE COURT:** Yeah. And they can just -- yeah, they may  
11 look at all of it.

12 But where are you on the Table of Contents at least?

13 **MS. LOVETT:** Your Honor, we're working with the  
14 Government this weekend to prepare that Table of Contents, and  
15 we should have it to the Court early next week, before the jury  
16 deliberates for sure.

17 **THE COURT:** Okay.

18 **MR. HEMANN:** We're in good shape on that, Your Honor.

19 **MR. FROELICH:** I think we're deciding on the format,  
20 and just a couple other things.

21 **MS. LOVETT:** Yeah. We worked on that before court  
22 this morning.

23 **THE COURT:** I'll get to you Mr. Froelich.

24 So anything more on -- you said you wanted to discuss an  
25 issue involving closing argument.

1           **MR. HEMANN:** A quick issue and it's more of a  
2 question, Your Honor. With regard to the use of transcripts  
3 during closing argument, we're happy to defer to whatever the  
4 Court's usual practice is in a criminal case in terms of  
5 displaying portions of transcripts, very obviously reading, you  
6 know, "This is right in the transcript."

7           But my experience is that then almost invites the jury to  
8 roll back in and say to the Court, "We'd like you to read us  
9 the transcript of so and so."

10          And, so, my -- some judges do not want us to invite the  
11 jury by talking about the transcript; other judges don't care.  
12 I just wanted to air it so that we follow the correct practice  
13 in the first instance and that we're all on the same page.

14          **THE COURT:** What's your view, Mr. Froelich? Do you  
15 have a view?

16          **MR. FROELICH:** Yes, Your Honor. The way I've  
17 always -- I've never seen anybody be able to put up transcripts  
18 because that's not -- that's not evidence in the case.

19          **THE COURT:** I agree with that.

20          **MR. FROELICH:** And I think you can argue what was said  
21 and you may say, "Do you remember this is what he said?" You  
22 know, I think you can argue what was said, but I don't think  
23 you can, you know, hold up a transcript.

24          **THE COURT:** I agree.

25          What do you think, Mr. Gasner?

1           **MR. GASNER:** I agree.

2           **THE COURT:** Okay. So let's not make it obvious. If  
3 it becomes a real issue in terms of, you know, somebody said  
4 the light was red and somebody said the light was green, you  
5 can say -- you know, I would give the instruction anyway, which  
6 is true, even though it's in the transcript, the jury's  
7 recollection controls. You know, and if they happen to  
8 misrecollect, that's what they get to do.

9           So I would -- I'm not going to bar you -- I don't have a  
10 rule barring people from doing it, but I do have a rule which  
11 doesn't allow display.

12           And I exhort counsel to, as much as possible, not have  
13 long read-ins of testimony. I think it's ineffective, number  
14 one. It loses the impact. If there's a word here and there,  
15 somebody said something, you know, an expert on direct or  
16 cross, for example, and you say, "You know, this expert used  
17 the word, you know, X," and assuming there's -- and I imagine,  
18 because both sides -- it's sort of like mutually assured  
19 destruction -- both sides have the transcript and will keep  
20 each other sort of honest about not misstating something.

21           So I think that's a fair point.

22           **MR. HEMANN:** Thank you, Your Honor.

23           **THE COURT:** There's one point that I wanted to raise,  
24 then I'll hear from Mr. Froelich, and I only raise it because  
25 it always worries me in a case. It worried me -- it worries me

1 as a judge. It worried me as a trial lawyer, although I didn't  
2 do criminal defense. It worried me as a prosecutor.

3 And we have two defendants that didn't testify in this  
4 case, and I want the Government to be very clear about -- and I  
5 know we have two very experienced and excellent prosecutors,  
6 but I would suggest you might -- that *Lopez-Alvarez* case has a  
7 very good explanation, sort of survey of the cases, on what one  
8 can say, what a prosecutor can say. Because, of course, it's  
9 misconduct for a prosecutor to comment on a defendant's failure  
10 to testify.

11 But the Court goes on to say at 585: (reading)

12 "However, a prosecutor may properly comment upon the  
13 defendant's failure to present exculpatory evidence as  
14 long as it is not phrased to call attention to the  
15 defendant's own failure to testify. A comment on the  
16 failure of the Defense as opposed to the defendant to  
17 counter or explain the testimony presented or evidence  
18 introduced is not an infringement of the defendant's  
19 Fifth Amendment privileges."

20 So I don't want -- I know the Government won't get close  
21 to the line. I don't -- I don't want to have unnecessary  
22 objections. The law is pretty clear on this, and I think both  
23 Mr. Axelrod and Mr. Hemann understand that.

24 And, of course, it's appropriate when a defense is put on,  
25 or even if it isn't put on, for the Government to comment on,

1 you know, "There's nothing in the record that contradicts X,"  
2 unless, you know, it's an explicit or a veiled reference to a  
3 defendant's failure to testify. I just want to make sure we  
4 don't have that injected in the record and we don't come close  
5 to the line.

6 **MR. HEMANN:** We have been reviewing this with the  
7 appellate group in the office already, Your Honor, and we're --  
8 we understand where we are with the defendants and with the  
9 state of the evidence; and we had looked at the *Lopez-Alvarez*  
10 case and that particular note yesterday, Your Honor.

11 **THE COURT:** Okay.

12 **MR. GASNER:** Your Honor, one big concern that I have  
13 relates to the tax charges. What is charged is a false  
14 representation as to gross receipts on USAPTI's tax returns,  
15 and the jury heard a lot of evidence about the subsequent  
16 transfers to Singapore. They heard some about transfers to  
17 Christina Liew's relatives, but that's it. And there was also  
18 evidence about even the FBI couldn't get a lot of documents out  
19 of Singapore or China, and there was talk about treaties and  
20 their inability to go there, et cetera.

21 So I think really it would be the third rail for the  
22 Government, and I believe they don't want a mistrial on this  
23 case, to say effectively, in one way or another, an innocent  
24 person would have come in and explained where the \$22 million  
25 went; and I'm hopeful that we won't hear that.

1           **MR. HEMANN:** I can tell you exactly what -- well,  
2 maybe not exactly, but largely what we would say. We would not  
3 say that, of course; but we certainly plan on talking about how  
4 there's not a scrap of evidence that was seized in the  
5 United States regarding the validity of these companies that  
6 were -- to which the money was transferred.

7           So our focus would be on -- and Special Agent Ho testified  
8 to that -- would be on the evidence that exists in the  
9 United States. We're not going to suggest that the Defense  
10 should have or could have, you know, gotten evidence from a  
11 particular place unless that argument is invited in the Defense  
12 closing.

13           **THE COURT:** Well, first of all, I don't want to  
14 micromanage the closing arguments. I'm almost sorry I raised  
15 this question, because we can get -- we can sort of rehearse  
16 the closing, and I can give you my proposed rulings on  
17 objections, but then we'd be here for seven or eight hours. So  
18 I understand that.

19           I'm not one that is big on the rule of invited error.  
20 I've seen it talked about, and the Ninth Circuit doesn't have  
21 very much sympathy for that from the Government, having been  
22 the subject of that myself, not inviting the error but somebody  
23 inviting the Court to commit error, and the Court saying -- the  
24 Ninth Circuit saying the Court did commit error and accepted  
25 the invitation. And they said, "Too bad. That's the way it

1 goes."

2       So I'm not -- we have very good lawyers here. I don't  
3 expect any problem with going over the line. And what I don't  
4 want to hear, just I'll tell you, I don't expect to hear lots  
5 of objections, especially in the rebuttal, where there's no  
6 evidence of that. Because then it just makes -- I usually just  
7 say, "ladies and gentlemen, your recollection controls."

8       If somebody makes up a witness or a document that doesn't  
9 exist, or something like that, then I will -- you don't even  
10 have to object. I'll be all over them. So I follow that.

11       But don't -- I'm not big on objections in closing unless  
12 something really -- something borders -- or is or borders on  
13 misconduct, and I don't expect that. Vouching in, for example,  
14 I see so much of that and there's never an objection. It just  
15 makes my hair stand on end, those kind of things. Asking the  
16 jury to put themselves in the place of one of the parties is so  
17 obviously wrong and nobody objects to it, so I don't do  
18 anything about it.

19       All right. So the next order of business will be, you  
20 know, we'll hear what you have to say. And if you're not going  
21 to file anything, rather than just let the deadline slip, just  
22 file something that says, "The Court is informed that the  
23 defendants will rely on the instructions proposed."

24       **MR. FROELICH:** Your Honor, can I go back to the  
25 instructions for just one second?



1           **THE COURT:** Yes.

2           **MR. FROELICH:** It dawned on me, I was looking at some  
3 of the exhibits, that on, for example, 161 and 162, the  
4 Government's Exhibits 161 and 162, stamped on the exhibits  
5 there is a confidentiality that we agreed upon. It was a C-1.  
6 We agreed to certain documents.

7           And I would like, it just dawned on me this morning, quite  
8 frankly, I would like some type of instruction that that is not  
9 part of the document or something to be considered by the -- by  
10 the -- that that was by agreement of counsel and not part of  
11 the document itself and something that should not be  
12 considered.

13           **THE COURT:** All right. Mr. Hemann?

14           **MR. HEMANN:** I think many, many documents have Bates  
15 numbers on them of one sort or another; and we certainly would  
16 not object to an instruction by the Court saying, "In many  
17 instances you will see Bates numbers on the bottom corner of  
18 the documents."

19           **THE COURT:** Mr. Froelich is not talking about Bates  
20 numbers.

21           **MR. FROELICH:** I don't care about Bates numbers.

22           **THE COURT:** The term "confidential" as having been --

23           **MR. GASNER:** I'm not sure whether the C-1 material  
24 still has a legend on the original.

25           **MR. HEMANN:** A legend, we would agree, should be

1 redacted, a legend provided by us --

2 **MR. FROELICH:** Right.

3 **MR. HEMANN:** -- or provided by --

4 **THE COURT:** Well, it's not going to be redacted. I  
5 will give an instruction that says -- and I don't know how to  
6 do this. In theory it would say: There are certain documents  
7 that are marked confidential. They were -- you know, they were  
8 marked for purposes of the litigation and not --

9 **MR. HEMANN:** Your Honor, let me make a suggestion.  
10 This is an area that's just -- it's going to be different for  
11 every document. We've just heard about this. We're happy to  
12 work with Mr. Froelich.

13 **THE COURT:** Take a look at it. I understand  
14 Mr. Froelich's point because if a document that the defendants  
15 claim, even one that was marked in the ordinary course of  
16 business as, you know, supersecret or whatever, they contend,  
17 "Well, that doesn't meet -- that's not legal," then that may be  
18 part of one element what DuPont did to protect.

19 But if they see it on a lot of documents, the totality of  
20 the throw weight of it might be, "Oh, you know, these are  
21 really secret confidential documents." And if they were  
22 stamped in the litigation itself, the jury has a right to know,  
23 "Hey, that's not the way they were kept in the ordinary  
24 course."

25 **MR. HEMANN:** Absolutely, Your Honor. I don't think --

1 I think that the real issue is that some of them bear what  
2 looks like -- what will look to the jury like a Bates number  
3 that says C dash blah, blah, blah, but they're not going to  
4 know what the "C" means.

5 **THE COURT:** I think that would be overworrying this  
6 case.

7 **MR. FROELICH:** I don't worry about that. It's just  
8 when I saw the confidentiality.

9 **THE COURT:** All right. Well, why don't you guys and  
10 ladies talk about it.

11 **MR. HEMANN:** We'll work it out.

12 **MR. FROELICH:** We'll talk about it.

13 **THE COURT:** Thank you. I'll see you on Tuesday. Have  
14 a great weekend, everybody.

15 **ALL:** Thank you, Your Honor.

16 **THE COURT:** The Court will take a few minutes to get  
17 ready for the next case.

18 (Proceedings adjourned at 9:01 a.m.)

19 ---oOo---

20

21

22

23

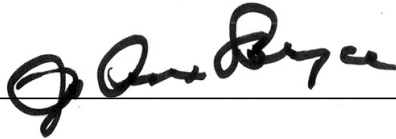
24

25

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Friday, February 14, 2014

A handwritten signature in black ink, appearing to read "Jo Ann Bryce", is written over a horizontal line.

Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR  
U.S. Court Reporter